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THE HISTORY OF THE HEARSAY RULE.

UNDER the name of the Hearsay Rule will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it. The history of the Hearsay Rule, as a distinct and living idea, begins only in the 1500's, and it does not gain a complete development and final precision until the early 1700's. Before tracing its history, however, from the time of what may be considered its legal birth, it will be necessary to examine a few salient features of the preceding century, in order to understand the conditions amid which it took its origin.

One distinction, though, must be noticed even before this preliminary survey, — the distinction between requiring an extra-judicial speaker to be called to the stand to testify, and requiring one who *is already on the stand* to speak only of his personal knowledge. The latter requirement had long ago been known in the early modes of trial preceding the jury. In the days when proof by compurgation of oath-helpers lived as a separate mode alongside of proof by deed-witnesses and other transaction-witnesses, "the witness was markedly discriminated from the oath-helper; the mark of the witness is knowledge, acquaintance with the fact in issue, and, moreover, knowledge resting on his own

observation."[1] Such a witness' distinctive function was to speak *de visu suo et auditu*.[2] The principle was not fully carried out; for a deed-witness need not have actually seen it executed, and might merely have promised by attestation to appear and vouch in court.[3] But at any rate this principle, so far as it prevailed, concerned a different mode of trial, "trial by witnesses," which jury-trial supplanted.[4] Afterwards, nearly three centuries later, when jury-trial itself had changed, and witnesses (now in the modern sense) became once more a chief source of proof, the old idea reappeared and was prescribed for them; the witness would speak to "what hath fallen under his senses,"[5] and this became in the modern law a fundamental principle. But at the time now to be considered, when jury-trial was coming in (say the 1300's), that principle belonged in what was practically another mode of trial, and did not affect the development.

What we are here concerned with is a different notion, namely, that when a specific person, not as yet in court, is reported to have made assertions about a fact, that person *must be called to the stand*, or his assertion will not be taken as evidence. That is to say: suppose that A, who does not profess to know anything about a robbery, is offered to prove that B, who did profess to know, has asserted the circumstances of the robbery; here B's assertion is not to be credited or received as testimony, however much he may know, unless B is called and deposes on the stand. As to the history of this simple but fundamental notion, — the Hearsay Rule proper, — it is necessary at the outset to notice briefly certain important conditions which prevailed at the beginning of the 1500's.

(*a*) And, first, it is clear that there was, up to about that time, no appreciation at all of the necessity of calling a person to the stand as a witness in order to utilize his knowledge for the jury.

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[1] 1892, Brunner, Deutsche Rechtsgeschichte, II. 397.

1902, Schröder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed., 772.

[2] 1898, Thayer, Preliminary Treatise on Evidence, 18, 499.

[3] Thayer, *ubi supra*, 98. A good additional illustration occurs in Seld. Soc., Select Civ. Pl., I. No. 76; and as late as 1543, in Rolfe *v.* Hampden, Dyer 53 *b*, a survival of this is seen in the case of two will-witnesses who "deposed upon the report of others." This was probably because such witnesses were originally transaction-witnesses, not document-witnesses, and in their latter character the earlier trait survived, as the history of the parol-evidence rule indicates.

[4] Thayer, *ubi supra*, 17, 500; Brunner, Entstehung der Schwurgerichte, quoted *infra*.

[5] 1670, Vaughan, C. J., in Bushel's Trial, 6 How. St. Tr. 999, 1003; 1696, Holt, C. J., in Charnock's Trial, 12 id. 1454.

On the contrary, the leading conditions and influences of jury-trial permitted and condoned the practice of the jury's obtaining information by consulting informed persons not called into court:

1872, Professor *Heinrich Brunner*, The Origin of Jury Courts, 427, 452: "We may not interpret the verdict '*ex scientia*,' in the domain of English law, as a verdict based on personal perception. The jurors of the assize were certainly entitled to give a verdict based on the communications of trustworthy neighbors. Glanvill makes it requisite, for the jurors' knowledge, 'that they should have knowledge from their own view and hearing of the matter or through the words of their fathers and through such words of persons whom they are bound to trust as worthy.' Thus they exhibit really in their verdict the prevailing conviction of the community upon the matter in question. For ascertaining this, ample opportunity is furnished by the 'view' and by the period of time elapsing between the view and the swearing in court. If their verdict agreed with the opinion throughout the community, they had nothing to fear from an attaint. . . . Thus the juror of the English law who gives a verdict *ex scientia* (with reference to the view of lands had) is a 'knowledge-witness' simply, whether his knowledge rests on his own perceptions or on another's communication. . . . The English knowledge-witness [juror] is not an eye-witness, not a *testis de scientia* in the sense of the later Norman law."[1]

1895, Sir *F. Pollock* and Professor *F. W. Maitland*, History of the English Law, II. 622, 625: "Some of the verdicts that are given must be founded on hearsay and floating tradition. Indeed, it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony. . . . At the least a fortnight had been given to them in which to 'certify themselves' of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants. . . . Separatively or collectively, in court or out of court, they have listened to somebody's story and believed it."

The ordinary witness, as we to-day conceive him, coming into court and publicly informing the jury, was (it must be remem-

[1] Professor Brunner goes on to point out (p. 453 ff.) that since in France the judicial use of "trial by witnesses" proper came early into prominence (in the 1300's and 1400's) through the civil or canonical system, and since the contrast between these two competing methods led the former to be called *testes de scientia* and the jurors merely *testes de credentia*, the jury system became discredited as an inferior one and ultimately fell into disuse. In other words, the lack of any sharp discrimination in England as to the sources of the jury's "knowledge" was the marked feature which enabled it to survive, in contrast to the fate of its kindred institution in Normandy, where circumstances had led to the emphasizing of its inferior sources of knowledge. Compare also Glasson, Hist. du droit et des inst. de la France, VI. 544.

bered) in the 1400's a rare figure, just beginning to be known.[1] Of persons thus called, the chief kinds were the preappointed ones, — deed-witnesses and other transaction-witnesses; and even these, with the jury, "all went out and conferred privately as if composing one body; the witnesses did not regularly testify in open court."[2] Even where facts were involved which, as we should think, needed other testimony, the counsel stated them by allegation, and a special witness might or might not be present to sustain the allegations.[3] Well into the 1400's "it was regarded as the right of the parties to 'inform' the jury after they were empanelled and before the trial."[4] In 1450 it is said by Chief Justice Fortescue, "If the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable,"[5] *i. e.* it is not the offense of maintenance.[6] Note that the only objection thought of is that of maintenance. In 1499 a juror, in a certain trial where a thunderstorm had caused a separation without leave, talked with a friend of one of the parties, and this, from the same point of view, was held not unlawful.[7] Such practices of obtaining information from informed persons not called were a chief reliance for the early jury. In fact, the strict notions then prevailing as to the offense of maintenance tended to discourage the coming of witnesses. In the 1400's "it was by no means freely done";[8] and when, in 1562–3,[9] compulsory process for ordinary witnesses was first provided, the measure came rather as a protection for the witness against the charge of maintenance than for any other reason. In short, as late as through the 1400's, there was not only no feeling of necessity for having every informant come to testify publicly in court,

[1] Note 4, *infra*.

[2] Thayer, *ubi supra*, 97, 102; this continued probably into the 1500's.

[3] Thayer, *ubi supra*, 121, 133.

[4] Thayer, *ubi supra*, 92; in Palgrave's "The Merchant and the Friar," there cited, an account of a trial for robbery in London in 1303 represents the sheriff as saying, when asked by the judge whether the jury is ready: "The least informed of them has taken great pains to go up and down in every hole and corner of Westminster — they and their wives — and to learn all they could concerning his past and present life and conversation."

[5] Y. B. 28 H. VI. 6, 1; cit. Thayer, 128; see also the petition quoted ib. 125.

[6] Again, in 1504 (Y. B. 20 H. VII. 11, 21; cit. Thayer, 129), Rede, J., says: "If the jury come to my house to be informed of the truth, and I inform them, that is not maintenance."

[7] Y. B. 14 H. VII. 29, 4; cit. Thayer, 132.

[8] Thayer, *ubi supra*, 130.

[9] St. 5 Eliz. c. 9, § 6.

but there was still a discouragement of such a general process; and the jury might and did get a great deal of its knowledge by express inquiry from specific persons not called or by the counsel's report of what had been or would be said by persons not called or not put on the stand.

(*b*) But in the meantime certain conditions were changing in a significant respect. Contrasting the end of the 1400's and the beginning of the 1600's, it appears, as the marked feature, that the proportion between the quantity of information obtained from ordinary witnesses produced in court and of information by the jury itself contributed or obtained was in effect reversed. The former element, in the 1400's, was "but little considered and of small importance";[1] but by the early 1600's the jury's function as judges of fact, who depended largely on other persons' testimony presented to them in court, had become a prominent one, perhaps a chief one.[2] It is necessary to appreciate that the ordinary witness (as we conceive him) did not come to be a common feature of jury trials till the very end of the 1400's.[3] Thus during the 1500's the community was for the first time dealing with a situation in which the jury depended largely, habitually, and increasingly, for their sources of information, upon testimonies offered to them in court at the trial.

(*c*) This, then, is the reason why another notion (a marked feature of the 1500's and early 1600's) should come into particular prominence at that epoch and not before. During that period much is found to be said, in the trials, about the number of witnesses, their sufficiency in quantity and quality. Juries were just beginning to depend for their verdict upon what was laid before them at the trial, and it was thus natural enough that they should begin to ask themselves, and to be urged by counsel to consider, whether they had been furnished with sufficient material for a right decision. Much begins to be thought and said, in statutes

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[1] Thayer, *ubi supra*, 130.

[2] For example, in 1499, Vavasour, J., says: "Suppose no evidence is given on either side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or the other; and so the evidence is not material to help or harm the matter" (Y. B. 14 H. VII. 29, 4, cit. Thayer, 133); while in the early 1600's, Coke says (3 Inst. 163) that "most commonly juries are led by deposition of witnesses." Another indication is seen in the practical disuse of the attaint by the end of the 1500's (Thayer, *ubi supra*, 138, 150, 153, 167), due largely to the fact that the jury now depended so much upon testimony in court.

[3] Thayer, *ubi supra*, 102, 121, 122, 126.

and otherwise, about having witnesses "good and lawful," "good and pregnant," "good and sufficient."[1] There was, moreover, already in existence at that time, well known to a large proportion of the legal profession, and only waiting for a chance to be imported and adopted, a mass of rules in the civil and canon law about the number of witnesses necessary in given cases, and the circumstances sufficient to complement and corroborate testimony deficient in number. Throughout the state trials of the 1500's and early 1600's, the accused is found insisting that one witness to each material fact is not enough.[2] In spite of these repeated appeals to the numerical system of the civil law, they produced no permanent impression in the shape of specific rules, except in treason and perjury.[3] But the general notion thoroughly permeated the times, and barely escaped being incorporated in the jury system. In a particular respect it left an impression material to the present inquiry. There had hitherto been no prejudice against the jury's utilizing information from persons not produced. But now that their verdict depended so much on what was laid before them at the trial, and now that the sufficiency of this evidence, in quantity and quality, began to be canvassed, it came to be asked whether a hearsay thus laid before them would suffice. It was asked, for example, whether, if there was one witness testifying in court from personal knowledge and another's hearsay statement offered, the two together would suffice.[4] Again, it was

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[1] In other respects, also, this was a time significant of a desire to see to the sufficiency of the evidence placed before a jury; see Thayer, *ubi supra*, 179, 180, 430.

[2] A single example must suffice; in Lord Strafford's Trial (1640), 3 How. St. Tr. 1427, 1445, 1450, he argues: "He is but one witness, and in law can prove nothing"; such "therefore could not make faith in matter of debt, much less in matter of life and death."

[3] The treason-statutes, coming in 1547–1554, will be noted later. The history of the numerical system, and of its failure to obtain a foothold in our law, is examined in detail in an article entitled "Required Numbers of Witnesses; A Brief History of the Numerical System in England," 15 HARV. L. REV. 83.

[4] 1541, Rolfe *v.* Hampden, Dyer 53 *b* (of three witnesses to a will, "two deposed upon the report of others, and the third deposed of his own knowledge," and there was no apparent objection, though "the jury paid little regard to the testimony aforesaid").

1622, Adams *v.* Canon, Dyer 53 *b*, note (disbursement of money for P.; of two witnesses, one "deposed that he himself knew it to be true, and being examined why he would swear that, answered, 'because his father had said so'; and in this case much was said about the deposition of witnesses; first, that if one witness depose of his own knowledge of the very point in question, and the other in the circumstances, that shall be sufficient ground for the judge to pass sentence"; here the "circumstances" means the hearsay statement, as shown by Pyke *v.* Crouch, *infra*.)

discussed in Queen Mary's reign (1553), whether, of the two accusers required in treason, one could testify by reporting a hearsay.[1] In Raleigh's trial (1603), Chief Justice Popham, refusing to produce Cobham to testify, explained that, "where no circumstances do concur to make a matter probable, then an accuser may be heard [in court, and not merely by extra judicial statement]; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced";[2] that is, a hearsay statement was sufficient if otherwise corroborated. So, too, the notion that persisted in the 1600's, that a hearsay statement, though not alone sufficient, was nevertheless usable in confirmation of other testimony,[3] was a direct survival of this treatment of hearsay from the standpoint of numerical sufficiency. During the 1500's nothing was settled in this direction; the matter was being debated and doubted. But the important feature is that the doubt about using hearsay statements — *i. e.* testimony from persons not called — was merely incidental to a general canvassing of the numerical and qualitative sufficiency of testimony, which in turn was a novelty arising from the jury-conditions of the 1500's.

It appears, then, that at the entrance to the 1500's (*a*) there had hitherto been no conception of a special necessity for calling to the stand persons to whose assertions credit was to be given; (*b*) that by the 1500's the increasing dependence of the jury on the evidence laid before them in court (as distinguished from their other sources of information) gave a new importance to such evidential material; and (*c*) that there was thus much debate as to the sufficiency of witnesses in number and kind, and that incidentally doubt began to be thrown on the propriety of depending on extra-judicial assertions, either alone or as confirming other testimony given in court.

With this preliminary survey, the process may now be traced of

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[1] 1553, R. *v.* Thomas, Dyer 99 *b* ("It was there holden for law, that of two accusors, if one be an accusor of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accusor").

1556, Dyer 134 *a*, note (under the treason statute requiring two accusers, "an accusation under the hands of the accusers or testified by others is sufficient").

1628, Coke, 3d Inst. 25 ("The strange conceit in 2 Mar. [Thomas's Case], that one may be an accuser by hearsay, was utterly denied by the justices in Lord Lumley's Case [1572]," "reported by the lord Dier under his own hand, which we have seen, but [is] left out of the print"); approved by Hale, Pleas of the Crown (1680), I. 306, II. 287.

[2] As reported in Jardine's Criminal Trials, I. 427.

[3] *Post*, p. 447.

making more precise and comprehensive the general notion against hearsay which thus sprang into consciousness. It will be convenient to consider, first, hearsay statements in general, and, next, hearsay statements under oath; for the rule as it affected the latter had both an earlier origin and a slower development.

I. *Hearsay statements in general.* (1) In the first place, then, there is no exclusion of hearsay statements. Through the 1500's and down beyond the middle of the 1600's, hearsay statements are constantly received, even against opposition. They are often objected to by accused persons, and are sometimes said by the judge to be of no value or to be insufficient of themselves, and are even occasionally excluded. In short, they are regarded as more or less questionable, and the doubt particularly increases in the 1600's; but, in spite of all, they are admissible and admitted. Nor is this result due to any abuse or irregularity peculiar to trials for treason or other State prosecutions; it is equally apparent in the rulings in the few civil cases that are reported. The practice is unmistakable.[1]

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[1] 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, Jardine's Crim. Trials, I. 157, 158, 159, 179, 201, 206, 210 (various letters and other hearsay statements are used against the accused).

1590, Stranham *v.* Cullington, Cro. Eliz. 228 (prohibition for suing for tithes; "they said that hearsay shall be allowed for a proof").

1601, Webb *v.* Petts, Noy 44 ("the witnesses said that for a long time, as they had heard say, the occupiers . . . had used to pay annually to the parson 3s."; held that "a proof by hearsay was good enough to maintain the surmise within the statute 2 Ed. 6").

1622, Adams *v.* Canon, Dyer 53 *b*, note (a hearsay admissible for one witness; see quotation *supra*).

1632, Sherfield's Trial, 3 How. St. Tr. 519, 536 (information in the Star Chamber against a vestryman of New Sarum for breaking a painted glass window; to show that the Bishop had warned him not to do it, one of the Court offered a letter from the Bishop, "but this being out of course, and a thing to which the defendant could make no answer, was not approved of").

1640, Earl of Strafford's Trial, ib. 1381, 1427 ("they prove very little but what they took upon hearsays").

1644, Archbishop Laud's Trial, 4 id. 315, 383 (argued for defendant: "He adds what Sir Thomas Ailsbury's man said. . . . But why doth he rest upon a hearsay of Sir Thomas Ailsbury's man? Why was not this man examined to make out the proof?"), 391 (argued for defendant: "Of all which there is no proof but a bare relation what Mr. H., Mr. I., and Sir W. B. said; which is all hearsay and makes no evidence, unless they were present to witness what was said [by me to them]"); 395 (argued for defendant: "This is but Sir E. P.'s report, and so no proof, unless he were produced to justify it"); again at 399, 402, 432, 534, 538 (in all these instances the hearsay statements are received).

1663, Moders' Trial, 6 id. 273, 276 (bigamy; a witness testified that he once saw the

(2) In the meantime, the appreciation of the impropriety of using hearsay statements by persons not called is growing steadily. By the second decade after the Restoration,[1] this notion receives a fairly constant enforcement, both in civil and in criminal cases. There are occasional lapses;[2] but it is clear that by general acceptance the rule of exclusion had now become a part of the law as well as of the practice. There even is found[3] a counsel for the prosecution stopping "for example's sake" its violation by his own witness. No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place.[4]

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first husband, not produced, "and the man did acknowledge himself to be so"; the Court: "Hearsays must condemn no man; what do you know of your own knowledge?" but the statement gets in).

1669, Hawkins' Trial, 3 How. St. Tr. 921, 935 (collateral charge that defendant picked N.'s pocket; N.'s statements to that effect were given by the witness, in spite of the defendant's demand that N. be called; Sir Matthew Hale was judge).

1670, Style's Practical Register 173 (citing a case of 1646).

[1] It is worth noting that the not uncommon belief which attributes most of the reforms in the rules of evidence in criminal trials to the Commonwealth of 1649 or the Revolution of 1688 is hardly well founded. In the present case, for example, the new idea comes in with the Restoration régime, 1660–1685; and this is generally true of the other matters of improvement. The Commonwealth went on with very much the same practices as the royal government which it overthrew; witness the argument of Mr. Prynne, who was one of the most vigorous opponents of Charles I. (quoted *post*). At the Restoration, much warning seems to have been taken, and it is then that the decided amelioration is apparent; the trials of the Regicides, for instance, were (contrary to the general impression) almost models of fairness, considering the prior practice. What was left to be done was done under Anne, after 1700, rather than under William. Even Scroggs, in 1678, did not much violate existing rules; and the real abuses and irregularities occurred chiefly in the terrible times of unrest and mutual suspicion, just before and after the Duke of York's accession, and at the hands of the unscrupulous Jefferies, whose faults were chiefly his own and abnormal. Compare the similar opinion of Professor Willis-Bund, State Trials for Treason, 1882, vol. II. Introd. xx.

[2] *E. g.* in the cases *infra* of 1680, 1681, 1682, 1686.

[3] *E. g.* in Colledge's Trial, *infra*.

[4] 1673, Pickering *v.* Barkley, Vin. Abr. "Evidence," P, b, 1, vol. XII. 175 (to show the mercantile usage construing a policy, "a certificate of merchants" was read in court; but "the Court desired to have the master of the Trinity-house and other sufficient merchants to be brought into court to satisfy the Court *viva voce*").

1676, Rutter *v.* Hebden, 1 Keb. 754 (objected that a contradictory statement of a witness could not be proved because not made on oath; but allowed).

1678, Bishop Burnet on the Popish Plot, 6 How. St. Tr. 1406, 1422, 1427 (refers to a part of Dugdale's testimony as "only upon hearsay from Evers, and so was nothing in the law").

1678, Earl of Pembroke's Trial, ib. 1309, 1325, 1336 (a deceased person's statements as to person injuring him, received; one of the statements was offered as a death-bed declaration; and counsel adds, "there are little circumstances which are always

(3) At the same time, and along with this general rule of exclusion, there is still a doctrine, clearly recognized, that a hearsay

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allowed for evidence in such cases, — where men receive any wounds, to ask them questions, while they are ill, about it, who hurt them").

1678, Ireland's Trial, 7 id. 79, 105 (the defendant, to prove an alibi at St. Omer's college in France, offered to bring "an authentic writing" "under the seal of the college and testified by all in the college, that he was there all the while"; Atkins, J.: "Such evidences as you speak of we would not allow against you; therefore we would not allow it for you"; afterwards, members of the college were produced in person).

1679, Samson *v.* Yardly, 2 Keb. 223 (appeal of murder; what a witness, now dead, swore on the indictment was excluded; "what the witness dead had said generally, being but hearsay of a stranger, and not of a party [in] interest, they would not admit, which might be true or false").

1680, Anderson's Trial, 7 How. St. Tr. 811, 865 (charge of being a priest and saying mass at the Venetian ambassador's; a letter of the ambassador, then out of the kingdom, denying his saying of mass, not admitted for the defendant).

1680, Gascoigne's Trial, ib. 959, 1019 (one Barlow being offered as a witness, but being apparently afraid to speak, one Ravenscroft offered to tell what Barlow had told him the night before; Pemberton, J.: "You must not come to tell a story out of another man's mouth"; yet after some objection he was allowed to tell the whole story).

1681, Plunket's Trial, 8 id. 447, 458 (other persons' statements of defendant's acts, admitted without objection), 461 (Witness: "Mr. L. B. told me that he did hear of the French —"; Pemberton, L. C. J.: "Speak what you know yourself").

1681, Busby's Trial, ib. 525, 545 (witness offers an affidavit of a register of births; Street, B.: "You ought to have brought the man along with you to testify it"; Witness: "The sexton is an old man above 60 years of age and could not come"; Street, B.: "That does not signify anything at all").

1681, Colledge's Trial, ib. 549, 603 (seditious publication; the Attorney General himself stops a prosecution-witness who tells what the printer said as to the author), 628 (another counsel for the prosecution does the same; "we must not permit this for example's sake, to tell what others said"), 663 (Counsel for prosecution: "You must not tell a tale of a tale of what you heard one say").

1682, Lord Grey's Trial, 9 id. 127, 136 (hearsay statements plentifully received without objection).

1684, Hampden's Trial, ib. 1053, 1094 (hearsay statements excluded; Jefferies, L. C. J.: "You know the law; why should you offer any such thing?").

1684, Braddon's Trial, ib. 1127, 1181, 1189 (Mr. J. Withins: "We must not hear what another said that is no party to this cause").

1686, Lord Delamere's Trial, 11 id. 509, 548 (hearsay statements put in without check).

1692, Stainer *v.* Droitwich, 1 Salk. 281 (an exception to the hearsay rule discussed as such).

1693, Thompson *v.* Trevanion, Holt 286, Skinner 402 (a hearsay statement, received apparently as an exception).

1696, Charnock's Trial, 12 How. St. Tr. 1377, 1454 (Holt, L. C. J., alludes to the objection as well founded, and informs the jury when charging them: "Therefore I did omit repeating [to you] a great part of what D. said, because as to him it was for the most part hearsay").

1697, Pyke *v.* Crouch, 1 Ld. Raym. 730 (if a testator sends a duplicate of his will

statement may be used as confirmatory or corroboratory of other testimony.[1] Here we have the survival of that notion about sufficiency and quantity, already referred to. A hearsay statement, by itself, is insufficient as the sole foundation for a conclusion; by itself it "can condemn no man," and so, by itself, it is excluded; but, when it merely supplements other good evidence already in, it is receivable. This limited doctrine as to using it in corroboration survived for a long time in a still more limited shape, *i. e.* in the rule that a witness's own prior consistent statements could be used in corroboration of his testimony on the stand;[2] and the latter was probably accepted as late as the end of the 1700's.[3]

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to a stranger "and the stranger sends back a letter" mentioning its receipt, "after the death of the stranger such letter may be read as circumstantial evidence" to prove that such a duplicate was sent).

[1] 1679, Knox's Trial, 7 How. St. Tr. 763, 790 (the witness's former statement offered; L. C. J. Scroggs: "The use you make of this is no more but only to corroborate what he hath said, that he told it him while it was fresh and that it is no new matter of his invention now").

1683, Lord Russell's Trial, 9 id. 577, 613 (L. C. J. Pemberton: "The giving evidence by hearsay will not be evidence"; Attorney-General: "It is not evidence to convict a man if there were not plain evidence before; but it plainly confirms what the other swears").

1692, Cole's Trial, 12 id. 876 (Mrs. Milward: "My lord, my husband [now deceased] declared to me that he and Mr. Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche"; Mr. J. Dolben: "That is no evidence at all, what your husband told you; that won't be good evidence, if you don't know somewhat of your own knowledge"; Mrs. Milward: "My lord, I have a great deal more that my husband told me to declare"; Mr. J. Dolben: "That won't do; what if your husband had told you that I killed Dr. Clenche, what then? This will stand for no evidence in law; we ought by the law to have no man called in question but upon very good grounds, and good evidence upon oath, and that upon the verdict of twelve good men." Nevertheless, he let her relate more of what her husband told her about the plot to kill Dr. Clenche; in charging the jury, he referred to it as "no evidence in law . . . especially when it is single, without any circumstance to confirm it").

1725, Braddon, Observations on the Earl of Essex' Murder, 9 How. St. Tr. 1229, 1272 ("It is true, no man ought to suffer barely upon hearsay evidence; but such testimony hath been used to corroborate what else may be sworn").

[2] 1682, Lutterell *v.* Reynell, 1 Mod. 282 (it was proved that one of the witnesses for the plaintiff had often "declared the same things" as now; and L. C. B. Bridgman "said, though a hearsay was not to be allowed as direct evidence, yet it might be made use of to this purpose, viz. to prove that W. M. was constant to himself, whereby his testimony was corroborated").

Ante 1726, Gilbert, Evidence, 149 ("A mere hearsay is no evidence; . . . but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions; . . . for such evidence is only in support of the witness that gives in his testimony upon oath").

[3] 1767, Buller, Trials at Nisi Prius, 294.

(4) In the meantime, the general rule excluding hearsay statements comes over into the 1700's as something established within living memory. It is clear that its firm fixing (as above observed) did not occur till about 1680; and so in the treatises of the early 1700's the rule is stated with a prefatory "It seems."[1] By the middle of the 1700's the rule is no longer to be struggled against;[2] and henceforth the only question can be how far there are to be specific exceptions to it.

What is further noticeable is that in these utterances of the early 1700's the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that "the other side hath no opportunity of a cross-examination." This reason receives peculiar emphasis in the final and comprehensive application of the rule to a peculiar class of statements made prior to the trial in hand, namely, statements made under oath. These come now to be considered.

II. *Hearsay statements under oath.* (1) As early as the middle of the 1500's a first step had been attempted towards requiring the personal production of those who had already made a statement upon oath. This requirement was limited to trials for treason; and the circumstances leading up to its introduction are described in the following passage:

1696, Bishop *Burnet*, arguing in the House of Lords, at Fenwick's Trial, 13 How. St. Tr. 537, 752: "There passed many attainders in that reign

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[1] 1716, Hawkins, Pleas of the Crown, II. 596, b. II. c. 46, § 44 ("As to the Fifth Point, viz. of parol evidence, and how far hearsay shall be admitted. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination").

1736, Bacon, Abridgment, Evidence, (K) ("It seems agreed that what another has been heard to say is no evidence, because the party was not on oath; also, because the party who is affected thereby had not an opportunity of cross-examining").

[2] 1701, Captain Kidd's Trial, 14 How. St. Tr. 147, 177 (Witness: "Here is a certificate [of my reputation] from the parish where I was born;" L. C. B. Ward: "That will signify nothing; we cannot read certificates; they must speak *viva voce*").

1716, Earl of Wintoun's Trial, 15 How. St. Tr. 804, 856.

1723, Bishop Atterbury's Trial, 16 id. 323, 455.

1725, L. C. Macclesfield's Trial, ib. 767, 1137.

1743, Craig dem. Annesley *v.* Anglesea, 17 id. 1160 (a statement of Mrs. P., deceased, as to a material fact was offered; after some debate, the Court excluded it "on the principal reason that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining").

1754, Canning's Trial, 19 id. 383, 406 (rule undisputed).

[of H. VIII.], only upon depositions that were read in both houses of parliament. It is true, these were much blamed, and there was great cause for it. . . . In Edward VI.'s trial, the lord Seymour was attainted in the same manner [*sc.* without being heard], only with this difference, that the witnesses were brought to the bar and there examined, whereas formerly they proceeded upon some depositions that were read to them. At the duke of Somerset's trial [in 1551], which was both for high treason and for felony, in which he was acquitted of the treason but found guilty of the felony, depositions were only read against him, but the witnesses were not brought face to face, as he pressed they might be.[1] Upon which it was that the following parliament enacted that the accusers (that is, the witnesses) should be examined face to face, if they were alive."[2]

The statute of 1553 thus referred to as first requiring the witness's production on the trial was St. 5 Edw. VI. c. 12, § 22.[3] This was followed by a similar provision in 1554, St. 1 & 2 P. & M. c. 10, § 11.[4] But this early step was premature; the innovation was too much in advance of the times; and it had only a short life. From the very year of the latter enactment, until the end of the succeeding century, it remained by judicial construction a dead letter. The means by which this result was reached was another section (§ 7) in the act of Philip and Mary, providing that trials for treason should be conducted "according to the common law," *i. e.* without any requirement of two witnesses or of producing witnesses; so that since the requirement of § 11 applied only to trials for the treasons defined by that very statute, the Crown, by bringing prosecutions on other definitions of treason (common law or statutory), was free from any such requirement.[5]

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[1] This may be seen in the duke's trial, in 1 How. St. Tr. 520.

[2] Substantially the same account as Bishop Burnet's is given in Rastal's Statutes (?), I. 102, as quoted in a note to the Duke of Somerset's Trial, 1 How. St. Tr. 520; but no edition of any of Rastal's books seems to contain such a passage.

[3] "Which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that which they have to say to prove him guilty," unless he confesses.

[4] Upon arraignment for treason, the persons "or two of them at the least," who shall declare anything against the accused "shall, if they be then living and within the realm, be brought forth in person before the party arraigned if he require the same, and object and say openly in his hearing what they or any of them can against him."

[5] 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873, 880, 883 (the defendant in vain invoked the treason-statute).

1571, Duke of Norfolk's Trial, ib. 958, 978, 992 (by the prosecuting Serjeant: "the

This judicial construction was perhaps strained, and was abandoned after the Revolution and under William III.'s government. Nevertheless it was clear law for a century and a half; and, when Sir Walter Raleigh insisted so urgently on the production of Lord Cobham, he was truly answered by Chief Justice Popham that "he had no law for it." [1]

Thus this limited attempt to require personal production, instead of *ex parte* depositions by absent persons, perished at its very birth. So far as this statutory attempt at the beginnings of a hearsay rule is concerned, it played no further part at all; except perhaps as furnishing a moral support for the opinion which was already working towards a general hearsay rule.

(2) That at this time, then (say, until the early 1600's), the general absence of any hearsay rule (as already noted) allowed equally the use of this specific class, namely, extra-judicial state-

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law was so for a time, in some cases of treason, but since the law hath been found too hard and dangerous for the prince, and it hath been repealed").

1586, Abington's Trial, ib. 1142, 1148 ("You stand indicted by the common law and the statute of 25 Edw. III., . . . and in that statute is not contained any such proof").

1603, Raleigh's Trial, 2 id. 16, 18; Jardine's Cr. Tr. I. 418, 420 (Popham, C. J. "Sir Walter Raleigh, for the statutes you have named, none of them help you. The statutes of the 5th and 6th of Edward VI. and of the 1st Edward VI. are general; but they were found to be inconvenient and are therefore repealed by the 1st and 2d of Philip and Mary, which you have mentioned, which statute goes only to the treasons therein comprised, and also appoints the trial of treasons to be as before it was at the common law").

1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1401 (same rule). Compare the decisions by which the same result was reached for the requirement of two witnesses: 15 HARV. L. REV. 83.

There was another similar statute about the same time, but it apparently was ineffective for the same reason: 1558, St. 1 Eliz. c. 1, § 27.

[1] The learned Mr. Jardine, in his Criminal Trials, I. 514, has vindicated this trial against the unjust criticisms of later times: "This doctrine and practice [of 1690 and later], however, though directly the reverse of those which preceded them, were not founded upon any legislative provision or any recorded decision of the Courts. But at the period of Raleigh's trial, there was, perhaps, no point of law more completely settled, than that the statute of the 1 & 2 Philip and Mary, c. 10, had repealed the provisions of the statute of the 5th of Edward VI., respecting the production of two witnesses in cases of treason. . . . If, therefore, the Judges who presided on Raleigh's trial were to abide by the solemn and repeated decisions of their predecessors, and the uniform practice of the courts of law for centuries, they could do no otherwise, consistently with their duty, than decide as they did."

Probably the great dramatist had Raleigh's notable trial in mind, when he wrote (about 1613) of Buckingham's trial, in King Henry VIII. ii. 1: "The king's attorney, on the contrary, Urged on the examinations, proofs, confessions, Of divers witnesses; which the duke desired To have brought *viva voce* to his face."

ments taken under oath, is clear enough. It appears as well in ordinary felony trials[1] as in treason trials.[2]

(3) It had, of course, always been usual (though, as just seen, not essential) to have the deponent present at the trial; but in such cases the general practice in state trials seems to have been, first to read aloud his sworn statement to the jury, and then to have him confirm it by declaring that it was "willingly and voluntarily confessed without menace or torture or offer of torture."[3] This went on till well into the 1600's. The sworn statement was still the main or the sufficient thing; but it was thought proper to have it openly adopted by the witness, so as to show that the prosecution did not fear a recantation. Thus the emphasis came gradually to be transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essential thing.

(4) About this time, however, and markedly by the middle of the 1600's (coincidently with the general movement already consid-

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[1] 1615, Weston's Trial, 2 How. St. Tr. 911, 924.

1615, Elwes' Trial, ib. 935, 941.

[2] To the instances of this already cited above, construing the treason statute, may be added the following:

1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, *passim*.

1586, Mary Queen of Scots' Trial, ib. 1162, 1183.

1590, Udall's Trial, ib. 1271, 1302.

Mr. Jardine, in his Criminal Trials, I. 514, says: "At the time of Raleigh's trial, most of the circumstances objected to by Sir John Hawles [under William III., about 1696] were strictly legal and justifiable; for instance, at that time, the depositions of absent persons were read, as the usual course of evidence which had prevailed for centuries in state prosecutions; this mode of proof constituted the general rule, and the oral examination of witnesses was the exception, which was in practice sometimes allowed, but was as often refused, and never permitted but by the consent of the counsel for the prosecution." He also asserts (Introd. I. 25) that "the ordinary mode of trying persons indicted for murder, robbery, or theft" forbade the use of depositions; but his only authority for this statement is Sir Thomas Smith's description of a trial, which does not sustain him; and the citations in the preceding note above seem to disprove his belief.

[3] The following list is only a selection:

1586, Babington's Trial, 1 How. St. Tr. 1127, 1131.

1589, Earl of Arundel's Trial, ib. 1250, 1252.

1600, Earl of Essex' Trial, ib. 1333, 1344.

1616, Earl of Somerset's Trial, 2 id. 965, 978. Compare the cases cited in 33 Amer. Law Rev. 376 ("Confessions; a Brief History").

The following case indicates a growing inclination to insist on this *viva voce* confirmation where the original examination was technically defective:

1631, Lord Audley's Trial, 3 How. St. Tr. 401, 402 ("certain examinations having been taken by the lords without an oath, it was resolved [by all the judges] those could not be used until they were repeated upon oath").

ered) the notion tends to prevail, and gradually becomes definitely fixed, that even an extra-judicial statement under oath should not be used if the deponent can be personally had in court. This much has now been gained; and it is seen in civil and in criminal trials equally. His statement, though, can still be used if he cannot be had in person, — for example, because of his death (and there is much vacillation of opinion as to the sufficiency of other causes, such as absence beyond sea); and nothing is as yet said as to the further objection that the deposition was not taken subject to cross-examination. The significant feature of this stage is the thought that the hearsay statement is usable only in case of necessity, *i. e.* the deponent ought to be produced if he can be.[1] But

[1] The first suggestion of this view seems to occur in the following cases:

1583, Puckley *v.* Bridges, Choice Cases in Ch. 163, quoted 1 Swanst. 171 (witnesses deceased and beyond seas; depositions in the Star Chamber, etc., used).

1590, Udall's Trial, 1 How. St. Tr. 1271, 1283, (examination on oath of one T. read, T. being beyond seas; but it does not appear that the latter circumstance was essential).

In Raleigh's Trial (1603), 2 id. 16, 18, Raleigh is willing to concede that Lord Cobham's deposition could have been used, "where the accused is not to be had conveniently"; yet there it was used, though Cobham was "alive, and in the House." But thereafter the precedents indicate a general acceptance of the notion stated above:

1612, Tomlinson *v.* Croke, 2 Rolle's Abr. 687, pl. 3 (deposition receivable if the deponent is dead, not if he is living).

1613, Fortescue & Coake's Case, Godb. 193 (depositions in chancery not to be read at law "unless affidavit be made that the witnesses who deposed were dead").

1629, Anon., ib. 326 ("if the party cannot find a witness," then his deposition "in an English court, in a cause betwixt the same parties," may be read).

1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 421 (a defendant in rape demanded that the lady be "produced face to face; which she was; who by her oath *viva voce* satisfied the audience").

1638, Dawby's Case, Clayt. 62 (admitted, when dead).

1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 672 (most of the witnesses spoke *viva voce;* a deposition was used of one who "was in town but he could not stay").

1658, Mordant's Trial, 5 id. 907, 922 (all sworn except one, an escaped prisoner, whose deposition was used).

1666, Lord Morley's Case, Kel. 55, 6 How. St. Tr. 770 (depositions before a coroner might be read if the deponent were dead, or unable to travel, or detained by defendant; but not if unable to be found).

1673, Blake *v.* Page, 1 Keb. 36 (speaks of the affidavit of an absent person as allowable, but apparently by consent only).

1678, Bromwich's Case, 1 Lev. 180 (like Lord Morley's Case).

1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1338 (a physician offers his prior deposition before the magistrate; the Court: "You must give it again *viva voce;* we must not read your examination before the Court").

1685, Oates' Trial, 10 id. 1227, 1285 (deposition of a witness not found after search, excluded).

1692, Harrison's Trial, 12 id. 833, 851 (deposition taken by the coroner in the defendant's absence, read because the defendant had eloigned the deponent).

When this necessity for the witness's absence could be foreseen (as when a deposi-

the thought that in any case there must indispensably have been an opportunity for cross-examination has not been reached.

(5) By the middle of the 1600's, the orthodox tradition in favor of allowing the use of extra-judicial sworn statements had thus become decidedly weakened and was on the point of giving way. Nevertheless, there was still a tradition of orthodoxy; and this tradition was in harmony with the practice of influential modes of trial other than trial by jury in the common law courts.[1] A fixed rule to the contrary was consciously an innovation; and this innovation, though now on the point of prevailing, remained still to be established and to acquire orthodoxy. From the middle of the century we see the idea still progressing. The state of opinion is illustrated by one of the prosecutions conducted by the anti-Stuart party just before it obtained the upper hand and deposed Charles I.:

1643, Col. *Fiennes'* Trial, 4 How. St. Tr. 185, 214; the defendant, tried by court-martial, argued that "no paper-deposition ought to be allowed by the law, in cases of life and death, but the witnesses ought to be all present and testify *viva voce*": that he had not had notice of the commission "so that he might cross-examine the witnesses"; then Mr. *Prynn*, for the prosecution, answered, among other things, that in the civil law and courts-martial trials were as usual "by *testimoniis* [*i. e.* depositions] as by *testibus viva voce;* that in the Admiralty, a civil law court, as likewise in the Chancery, Star-Chamber, and English courts formed after the civil law, they proceed usually by way of deposition; that even at the common-law in some cases, depositions taken before the coroner, and examinations upon oath before the chief justice or other justices, are usually given in evidence even in

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tion *de bene* was asked for before trial), there are some early indications that cross-examination would be a required condition: 1606, Matthews *v.* Port, Comb. 63 ("The witnesses may be examined [prior to trial] before a judge, by leave of the Court, as well in criminal causes as in civil, where a sufficient reason appears to the Court, as going to sea, etc., and then the other side may cross-examine them").

1662, St. 13–14 Car. II, c. 23, § 5 (in certain insurance claims, seamen being often the witnesses, an oath *de bene* may be administered, "timely notice being given to the adverse party, and set up in the office before such examination, to the end such witness or witnesses may be cross-examined").

[1] *Ante* 1635, Hudson, Treatise of the Star Chamber, pt. III. § 21, in Hargr. Collect. Jurid. 200 ("It is a great imputation to our English courts that witnesses are privately produced," in chancery; pointing out that the ecclesiastical court does otherwise, and reciting a recent reform of L. C. Egerton that witnesses should be produced before the opponent, "that the other side might examine him also if they please").

1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 769, 772 (Banks, Attorney-General, arguing in the Star-Chamber, says: "The proceedings in this Court, as in all other Courts, is by examination of witnesses returned in parchment, not *viva voce*").

capital cases; that the high court of Parliament hath upon just occasions allowed of paper depositions in such cases"; and the depositions were "upon solemn debate" admitted.

This case, to be sure, was no precedent for a common law trial, and it occurred amidst a bitter political controversy; but it sufficiently illustrates the unsettled state of opinion and the tendency of the time.[1] Yet no final settlement came under the Commonwealth, nor under the Restoration, nor directly upon the Revolution.[2]

(6) By 1680–1690 (as already noted above) had come the establishment of the general rule against unsworn hearsay statements. This must have helped to emphasize the anomaly of leaving extra-judicial sworn statements unaffected by the same strict rule. By 1696, or nearly a decade after the Revolution, that anomaly ceased substantially to exist. A few rulings under the Restoration had foreshadowed this result;[3] but in that year

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[1] A reflection of the English rule in this period is seen in the following colonial records:

1660, Mass. Revised Laws and Liberties, Whitmore's ed., "Witnesses," § 2 (a witness' testimony may be taken before the magistrate, but, if the witness lives within ten miles and is not disabled, it shall not be used "except the witness be also present to be further examined about it; provided also that in capitall cases all witnesses shall be present, wheresoever they dwell"; repeated in the Revision of 1672).

1692, Proprietor *v.* Keith, Pa. Colon. Cas. 117, 124 (affidavits were offered to prove the truth of a libel; but the Court "were very unwilling to have them read, saying it was no evidence unless the persons were present in court"; yet they permitted some to be read, since the witnesses could not be present "by reason of the extremity of the weather"). See also Browne's History of Maryland, 84.

[2] Mr. Jardine, in his Criminal Trials, Introd., I. 25, 29, says: "The ancient mode of proof by examinations [under oath of absent persons] continued to be the usual and regular course [in cases of treason or other state offences] during the reigns of Elizabeth, James I., and Charles I. . . . During the Commonwealth the practice of reading the depositions of absent witnesses entirely disappeared, and has never been since revived. . . . It is believed that not a single instance can be produced of the reading of the deposition of an absent witness on the trial of a criminal (except in cases expressly provided for by statute), since the reign of Charles I." It would seem that the instances in note 1, p. 452, *supra*, show the practice to have been sanctioned until after the Revolution; Mordant's Trial, above cited, certainly shows that it did not cease during the Commonwealth. Mr. Jardine seems to have had a general but incorrect notion that the older methods ceased with the Commonwealth; for example, that torture did not cease, as he believes it did, has been noticed in the article cited *ante*, in note 3, p. 451.

[3] *Ante* 1668 (no date or name), Rolle's Abr. II. 679, pl. 9 (depositions taken by bankruptcy commissioners, not admitted, "in a suit in which comes in question whether he was a bankrupt or not, or to prove anything depending on it, for the other party could not cross-examine the party sworn, that is the common course").

1669, R. *v.* Buckworth, 2 Keb. 403 (perjury; testimony of a deceased witness

it was definitely and decisively achieved, in the trials of Paine and of Sir John Fenwick. The former was a ruling by the King's Bench after full argument, and came in January.[1] The latter, coming in the next November,[2] involved a lengthy debate in Parliament; and, though the vote finally favored the admission of the deposition, the victory of reaction was in appearance only; for the weighty and earnest speeches in this debate must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination, and made it impossible thereafter to dispute the domination of that rule as a permanent element in the law.[3] From this time on, the appli-

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sworn at the trial where the perjury was committed, received; by two judges to one).

Ante 1680, Hale, Pleas of the Crown, I. 306 ("The information upon oath taken before a justice of the peace" is admissible in *felony*, if the deponent is unable to travel, yet in *treason* this is "not allowable, for the statute requires that they be produced upon arraignment in the presence of the prisoner, to the end that he may cross-examine them").

1688, Thatcher *v.* Waller, T. Jones 53 (deposition before the coroner of one beyond sea, admitted; but held that a deposition before a justice of the peace should not be received; the case of the coroner standing on the ground of a record).

1694, R. *v.* Taylor, Skinner 403 (affidavit not admissible); and the citations at the end of note 1, p. 452, *supra*.

[1] 1696, R. *v.* Paine, 5 Mod. 163 (libel; a deposition of B., examined by the mayor of Bristol upon oath but not in P.'s presence, was offered; it was objected that "B. being dead, the defendant had lost all opportunity of cross-examining him," and the use of examinations before coroners and justices rested on the special statutory authority given them to take such depositions; the King's Bench consulted with the Common Pleas, and "it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination"; the reports of this case in 1 Salk. 281, 1 Ld. Raym. 729, are brief and obscure).

[2] It is a little singular that R. *v.* Paine is not cited by any of the numerous debaters in Fenwick's Trial. The date of the former is given as Hilary Term, 7 Wm. III., which must have been January, 1696, or ten months before Fenwick's Trial. It is cited in Bishop Atterbury's Trial, in 1723, *infra*.

[3] 1696, Fenwick's Trial, 13 How. St. Tr. 537, 591–607, 618–750 (the sworn statement before a justice of the peace of one Goodman, said to have absented himself by the accused's tampering, was offered on a trial in Parliament; a prolonged debate took place, and this deposition, termed hearsay, was opposed on the precise ground of "a fundamental rule in our law that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence," "by which much false swearing was often detected"; the deposition was finally admitted, on Nov. 16, by 218 to 145 in the Commons, and the attainder passed by 189 to 156 in the Commons and by 66 to 60 in the Lords; but it is clear from the debate that many of those voting to receive the deposition did so on the theory that Parliament was not bound to follow the rules of evidence obtaining in the inferior Courts; the speeches claiming that those rules would admit it were half-

cability of the hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned.[1] From the beginning of the 1700's the writers upon the law assume it as a settled doctrine;[2] and the reason of the rule in this connection is stated in the same language already observed in the history of the rule in general, namely, that statements used as testimony must be made where the maker can be subjected to cross-examination.[3]

(7) There were, however, two sorts of sworn statements which, being already expressly authorized by statute, though not expressly made admissible, might be thought to call for special exemption, namely, the sworn examination of witnesses before justices of the peace in certain cases, and of witnesses before a coroner. That the rule excluding depositions taken without cross-examination should be applied to those of the former sort was not settled until the end of the 1700's.[4] That it should apply to those of the latter sort never

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hearted and evasive; moreover, the prosecution only ventured (595) to offer it as "corroborating evidence"; see *supra*, note 1, p. 447).

[1] The last remnant of hesitation is found in Bredon *v.* Gill (1697), 2 Salk. 555, 1 Ld. Raym. 219, 5 Mod. 279 (question whether on statutory appeal from excise-commissioners to appeal-commissioners depositions below could be used or the witnesses should "be brought in again personally and be examined *viva voce*"; ruled at first that "the law does not make *viva voce* evidence necessary, unless before a jury; in other cases depositions may be evidence"; but afterwards, *mutata opinione*, the Court required examination *de novo*). But the persistence with which the older notion lingered on is seen in Bishop Atterbury's Trial, 16 How. St. Tr. 323, 463, 471, 495, 503, 523, 536, 595, 607, 608, 616, 673; here an examination before the Council, not on oath, of one since dead, was on an impeachment voted by a majority of the Lords to be received; but the vote was clearly the result of hot partisanship, and the managers of the impeachment conceded that their evidence was not legal; in this trial the first citation of R. *v.* Paine occurs, at p. 536.

[2] 1730, Emlyn, Preface to State Trials, 1 How. St. Tr. xxv: ("The excellency therefore of our laws above others I take to consist chiefly in that part of them which regards criminal prosecutions. . . . In other countries . . . the witnesses are examined in private and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present and at liberty to cross-examine them").

Ante 1726, Gilbert, Evidence, 58 ff.

1747, Eade *v.* Lingood, 1 Atk. 203 (deposition before bankruptcy commissioners, excluded).

[3] See the quotations in the preceding six notes.

[4] 1739, R. *v.* Westbeer, 1 Leach Cr. L., 4th ed., 12 (deceased accomplice's information upon oath, admitted, though it was objected that the defendant "would lose the benefit which might otherwise have arisen from cross-examination").

1762, Foster, Crown Law, 328 (the eminent author regards a deceased deponent's examination before either coroner or justices as admissible, not discriminating as to the accused's presence and cross-examination).

1789, R. *v.* Woodcock, 2 Leach Cr. L., 4th ed., 500 (justice of the peace's examination of the victim of an assault, excluded).

came to be conceded at all in England,[1] — at least, independently of statutory regulation in the 1800's; and long tradition availed to preserve the use of these, though only as a distinct exception to a general rule. That general rule, from the beginning of the 1700's, was clearly understood to exclude alike sworn and unsworn statements made without opportunity to the opponent for cross-examination. From that period the rule could be broadly stated in the words of a judge writing just two centuries later:[2] "Declarations under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence."

One noteworthy consequence, having an important indirect influence on other parts of the law of evidence, was the addition of a new activity to the accepted functions of the counsel for an accused person. In 1695[3] counsel had been allowed, in treason only, to make full defense for the accused; but until 1836[4] no law allowed this in felony. Yet as soon as the right of cross-examination was established, it was indispensable that trained counsel should be permitted to conduct it, if it were to be effective.[5] And so in a short time this practice (without technical sanction) forced itself on the judges in criminal trials:

1883, Sir *James Stephen*, History of the Criminal Law, 1. 424: "The most remarkable change introduced into the practice of the courts [from the middle of the eighteenth century] was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. . . . In Barnard's trial [in 1758] his counsel seem to have cross-examined all the witnesses fully. . . . On the other hand, at the trial of Lord Ferrers two years later, the prisoner was obliged to cross-examine the witnesses without the aid of counsel. . . . The change [of law by the statute of 1836] was less important than it may at first sight seem to have been."

Indirectly, this resulted speedily in a new development, to a degree before unknown, of the art of interrogation and the various

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1790, R. *v.* Eriswell, 3 T. R. 707 (justice of the peace's examination of a pauper as to his settlement; a divided Court).

1801, R. *v.* Ferryfrystone, 2 East 54 (the excluding opinion of the preceding case confirmed).

[1] R. *v.* Eriswell, *supra.*

[2] 1889, Vann, J., in Lent *v.* Shear, 160 N. Y. 462, 55 N. E. Rep. 2.

[3] St. 7–8 Wm. III. c. 3.

[4] St. 6–7 Wm. IV. c. 114.

[5] By the prosecuting counsel it had of course already been employed, *e. g.* 1688, Seven Bishops' Trial, 12 How. St. Tr. 183.

rules of evidence naturally most applicable on cross-examinations, — particularly, the impeachment of witnesses. Furthermore, it resulted ultimately in the breakdown of the old fixed tradition that a criminal trial must be finished in one sitting. The necessary sifting of testimony by cross-examination took double and treble the time used of yore. Under vast inconvenience, the old tradition was preserved,[1] until at last it gave way, from very exhaustion, to the new necessities.[2]

What we find, then, in the development of the Hearsay Rule is: (1) A period up to the middle 1500's, during which no objection is seen to the use by the jury of testimonial statements by persons not in court; (2) Then a period of less than two centuries, during which a sense arises of the impropriety of such sources of information, and the notion gradually but definitely shapes itself, in the course of hard experience, that the reason of this impropriety is that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of probing their trustworthiness by means of cross-examination; (3) Finally, by the beginning of the 1700's, a general and settled acceptance of this rule as a fundamental part of the law.[3] Such, in brief, seems to have been the course of development of that most characteristic rule of the Anglo-American law of evidence, — a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure.

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[1] "Mr. Erskine made his celebrated speech in Lord George Gordon's case, 1781, after midnight, and the verdict was given at 5.15 A. M., the Court having sat from 8 P. M. the previous day. In 1794, in Hardy's case, the Court sat from 8 till past midnight" (Sir H. B. Poland, A Century of Law Reform, 1901, p. 63).

[2] Until the trial of Hardy, in 1794, "there had not yet been an instance of a trial for high treason that had not been finished in a single day" (Campbell, Lives of the Chancellors, 5th ed., VIII. 307).

[3] It therefore does not date back so far as our judges have sometimes fondly predicated, — for instance, "to Magna Charta, if not beyond it" (Anderson *v.* State, 89 Ala. 12, 7 So. Rep. 429; 1890).